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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 681

SOUTHSIDE VIRGINIA TELECASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. 1a) has not been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the Federal Communications Commission, was entered on December 29,

1955 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on February 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 47 U.S.C. 402 (j).

QUESTION PRESENTED

Whether the Federal Communications Commission, in granting one of two mutually-exclusive applications for a television station, erred in not crediting testimony by the president of the unsuccessful applicant, which it found was not substantiated by the other evidence in the record.

STATUTES INVOLVED

The pertinent sections of the Communications Act of 1934 and the Administrative Procedure Act are set forth in the petition, pp. 2-3.

STATEMENT

Southside Virginia Telecasting Corporation, petitioner herein, and Petersburg Television Corporation, intervenor in the court below, filed applications with the Federal Communications Commission for a permit to construct a new commercial television station for operation on Channel 8 in Petersburg, Virginia. Since both applicants sought use of the same frequency, the applications were mutually exclusive and were designated for comparative hearing to determine which applicant would better serve the public interest as a television station licensee. See *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327.

After a full comparative hearing, the Commis-

sion on October 1, 1954, granted the application of Petersburg Television, on the ground that operation of the station by it would best serve the public interest (R. 332). In its opinion the Commission made detailed findings of fact on the various grounds advanced by each applicant as to why its application should be granted.

The Commission found that both applicants were financially, technically, and legally qualified to operate the proposed station (R. 282). It concluded, however, that while both applicants proposed a diversified, well rounded program service (R. 318), the application of Petersburg Television was to be preferred, primarily because of the latter's superior "service philosophy." The Commission found that Petersburg Television would program for its entire service area, while Southside contemplated a narrower service designed to meet only the needs of the city of Petersburg and the "Southside Virginia" area immediately surrounding and to the south of Petersburg (R. 331, 322-326, 303-304), and which did not take into account the needs of the northern portion of its service area. Petersburg Television was also found to merit preference with respect to its plans for programming from areas remote from its studio and transmitter (R. 331, 321, 295), for better agricultural program proposals (R. 331, 320-321, 296-297), and for its more extensive utilization of the talent and program resources of Richmond (R. 331, 325-326, 292-293).

In concluding that Petersburg Television had the superior "service philosophy," the Commis-

sion took full account of the testimony of Southside's president and principal stockholder that while petitioner intended to place primary emphasis on roughly the southern half of its service area (Petersburg and Southside Virginia), it expected to devote secondary emphasis on the roughly northern part of the service area (R. 304). However, the Commission found that the record did not support those assertions (R. 304). It held (R. 304, 322) that the evidence showed that petitioner's programming proposals ignored the needs or desires of those who live in the northern half of its service area (R. 304, 322). It noted that while petitioner had made rather complete preparations for its programming proposal in the Petersburg and Southside Virginia area, it had made no contacts at all in the northern half of its service area. Moreover, all of its programming, other than that relating to state and national affairs, was designed for Petersburg and Southside Virginia to the exclusion of that part of its proposed service area lying north of the James River (R. 304-6, 322). This failure to consider the needs of the northern area, the Commission held, was particularly serious because none of the many small communities there has a television station and it is obviously desirable that clergymen, schools, and other local groups have as many opportunities and outlets for local expression as possible (R. 324).[1]

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[1] On the other hand, the Commission held, on the basis of the evidence, that Petersburg Television had made contacts

On appeal, the Court of Appeals unanimously affirmed the Commission's order. In a short *per curiam* opinion (Pet. App. 1a), the court concluded: "We do not find that the Commission ignored factors that required consideration or acted arbitrarily in choosing between the applicants."

ARGUMENT

The only question which petitioner presents is whether the Commission erred in disregarding certain testimony by petitioner's president and principal stockholder as to the service which petitioner proposed to render in the northern portion of its service area. Although petitioner contends that the decision below, in sustaining the Commission's refusal to credit that testimony, conflicts with decisions in other circuits which hold that "uncontradicted testimony or evidence fully credited and worthy of belief cannot be totally disregarded by a fact finder as entitled to no weight whatsoever" (Pet. p. 7), there is in fact no such conflict of decisions. For, as pointed out in the Statement (*supra*, pp. 3-4), the Commission did not disregard this testimony, but considered it carefully and concluded that it could not be accepted because it was contradicted by other evidence in the record. In short, the Commission concluded that because of other impeaching evidence, the testimony should be neither "fully cred-

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both in person and by letter with many persons in its entire service area to determine their programming needs and interests (R. 292-4, 322-3).

ited" nor considered to be wholly "worthy of belief."

We submit that the Commission was not required to accept the self-serving testimony of an interested witness that Southside would serve the northern communities on a secondary basis, when other evidence in the record showed that Southside's actual programming plans and contacts did not provide for such service to those communities. Under these circumstances, the Commission's conclusion that Southside would "ignore or pay no heed to the roughly northern half of its coverage area, unless the Richmond stations fail in some respect in their programming for this area" (R. 324) was neither arbitrary nor unreasonable, but on the contrary constituted a justifiable inference from the facts in the record.[2]

The contention that the Commission had improperly rejected the testimony in question was

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[2] Petitioner's contention that the Commission failed to consider other evidence allegedly corroborative of the testimony of its president (Pet. p. 5) is without merit. The Commission fully considered the past programming of radio station WSSV which is wholly owned by petitioner's president and his wife (R. 289), and found that such programming was directed to Petersburg and Southside Virginia (R. 304, 313, 314). It also considered petitioner's proposed programming, but found it did not contemplate any substantial programming directed towards the special interests of the northern portion of its proposed service area (R. 303-306, 324-325, 331). The fact that petitioner hoped to sell advertising time in the Richmond area is clearly not a showing that its service would meet the needs of communities in the north, since many Richmond advertisers would be interested in reaching buyers in Southside Virginia.

fully pressed in the court below and that court concluded that the Commission had not "ignored factors that require consideration or acted arbitrarily in choosing between the applicants." There is no occasion for a further review by this Court of the evidentiary support for the Commission's findings. Cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question warranting further review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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